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November 1, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re CriticalWireless Corporation

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Serial No. 78164647

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Russell D. Culbertson of Shaffer & Culbertson, L.L.P., for  
CriticalWireless Corporation.

Dominic J. Ferraiuolo, Trademark Examining Attorney, Law  
Office 102 (Thomas V. Shaw, Managing Attorney).

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Before Bucher, Grendel and Zervas, Administrative Trademark  
Judges.

Opinion by Grendel, Administrative Trademark Judge:

Applicant seeks registration<sup>1</sup> on the Principal Register  
of the mark CRITICALWIRELESS (in standard character form)

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<sup>1</sup> Serial No. 78164647, filed on September 16, 2002. The  
application is based on use in commerce. September 1, 2000 is  
alleged in the application as the date of first use anywhere, and  
April 3, 2002 is alleged as the date of first use in commerce.

for goods identified in the application (as amended) as "transceiver unit for remote monitoring systems."<sup>2</sup>

The Trademark Examining Attorney has issued a final refusal of registration on the ground that applicant's mark, as applied to applicant's goods, is merely descriptive thereof. Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1). Applicant has appealed the final refusal. After carefully reviewing the evidence of record and the arguments made by applicant and the Trademark Examining Attorney, we reverse.

The evidence of record includes the application file, and numerous excerpts from the Nexis database submitted by

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<sup>2</sup> As originally filed, the identification of goods read "wireless communication system, comprised of transceivers, receivers, and integrated circuits." In its August 12, 2003 response to the first Office action, applicant requested amendment of the goods to "transceiver unit for remote monitoring systems." In his January 16, 2004 final Office action, the Trademark Examining Attorney did not mention or act on the requested amendment of the identification of goods. However, the Office's electronic record for the application identifies the goods as if the amendment had been accepted, and in their appeal briefs, applicant and the Trademark Examining Attorney have identified applicant's goods in their amended form, i.e., "transceiver unit for remote monitoring systems." We shall do the same. We also note that in the original application, applicant had submitted a disclaimer of the term WIRELESS. In his first Office action, the Trademark Examining Attorney informed applicant that such disclaimer was unnecessary due to the unitary nature of the mark. In its response to the first Office action, applicant requested that the application be amended to withdraw the disclaimer. The Trademark Examining Attorney did not expressly address this requested amendment in his final Office action, but it appears that the amendment has been entered because no disclaimer appears in the Office's current electronic record for the application.

the Trademark Examining Attorney.<sup>3</sup> In his brief, the Trademark Examining Attorney also refers to the contents of applicant's website. (Trademark Examining Attorney's brief at unnumbered page 2.) Because this content has not been made of record, we have given the Trademark Examining Attorney's summary of it no consideration. We note, however, that even if the Trademark Examining Attorney's summary of the website content is correct, our analysis and decision herein would be unchanged.

The burden of establishing that a term is merely descriptive is on the Trademark Examining Attorney. Our decision as to whether the Trademark Examining Attorney has met that burden is determined by the following principles.

A term is deemed to be merely descriptive of goods or services, within the meaning of Trademark Act Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *See, e.g., In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987), and

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<sup>3</sup> The Nexis excerpts are primarily from newswire releases, to which the Board generally gives little probative value as evidence. *See In re Opus One Inc.*, 60 USPQ2d 1812, 1815 n.7 (TTAB 2001). *But see In re Cell Therapeutics Inc.*, 67 1795 (TTAB 2003). In this case, however, applicant has not objected to the Trademark Examining Attorney's reliance on this newswire evidence, and indeed has discussed and relied upon it in its own briefs. In these circumstances, we shall consider this evidence and give it its appropriate probative value.

*In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered merely descriptive; it is enough that the term describes one significant attribute, function or property of the goods or services. See *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338 (TTAB 1973).

Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use. That a term may have other meanings in different contexts is not controlling. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979).

Moreover, it is settled that "[t]he question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods or services are will understand the mark to convey information about them." *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002). See also *In re Patent & Trademark Services Inc.*, 49 USPQ2d

1537 (TTAB 1998); *In re Home Builders Association of Greenville*, 18 USPQ2d 1313 (TTAB 1990); and *In re American Greetings Corporation*, 226 USPQ 365 (TTAB 1985). Finally, the fact that applicant's mark is two words, CRITICAL and WIRELESS, compressed into one term, CRITICALWIRELESS, does not change our analysis, because the compressed term and the two word term have the same meaning. See, e.g., *In re Tower Tech, Inc.*, 64 USPQ2d 1314 (TTAB 2002)(SMARTTOWER); and *In re Sun Microsystems Inc.*, 59 USPQ2d 1084 (TTAB 2001)(AGENTBEANS).

The Trademark Examining Attorney's arguments in support of his mere descriptiveness refusal are aptly summarized by these opening and closing excerpts from his brief (at unnumbered pages 2 and 4):

The Applicant states that it believes the term "criticalwireless" does not immediately convey knowledge of the qualities or characteristics of its goods, yet fails to discuss or present any information and/or evidence that would distinguish its goods from other goods that are wireless and in fact designed specifically for and to meet critical wireless needs and standards. The wording "wireless" in fact appears on the face of its goods. The examining attorney has made of record numerous cites from the Nexis database that show use of the wording "critical wireless" as part of merely descriptive wording used to identify particular classes of wireless applications such as critical wireless, mission critical wireless and business critical wireless. The majority of these stories show use of these wordings to merely describe critical wireless technologies, critical wireless networks, critical wireless services and the critical wireless

industry, including its widespread application, use and regulation throughout both the public and private sectors.

The wording "critical wireless" clearly has meaning in the wireless industry for the particular wireless applications and solutions that it designates and for all those who use and utilize critical wireless hardware for critical wireless applications and solutions. The applicant's position that the wording "critical wireless" does not convey any knowledge or information about its goods is unsupported in light of widespread wireless industry and related-industry use of the wording "critical wireless" to identify and define a particular class, classes, category and/or categories of wireless goods specifically designed to meet business and industrial critical wireless standards and needs, as well as meet government critical wireless standards.

For the reasons discussed below, we are not persuaded that the evidence of record supports the Trademark Examining Attorney's argument that there is a "critical wireless" industry or a "critical wireless" class of goods or class of purchasers, or that "critical wireless" merely describes the goods identified in the application, i.e., "transceiver unit for remote monitoring systems."

First, contrary to the Trademark Examining Attorney's argument, the fact that the word "wireless" appears on applicant's goods does not prove that the term "critical wireless" is merely descriptive of applicant's goods, even when that fact is considered with the other evidence of record. Second, the Nexis evidence discussed below (including all of the excerpts specifically relied upon by

the Trademark Examining Attorney in his brief), does not persuade us that "critical wireless" is merely descriptive of applicant's goods.

As noted by the Trademark Examining Attorney, there are Nexis excerpts<sup>4</sup> which use the words "mission critical wireless" together. However, these do not prove that "critical wireless" is merely descriptive of applicant's goods. These excerpts include:

Mobile Computing Corporation is a leading provider of mission critical wireless enterprise business solutions for the transportation, logistics and field force automation markets. (Exh. 1, p.1.);

We are extremely pleased for the opportunity to support the U.S. military with mission critical wireless system support. This new BOA provides tacit approvals for the DoD to cost effectively acquire leading edge secure wireless solutions... (Exh. 2, p.38.);

... leads the WLAN industry with award winning innovative solutions that enable enterprises to deploy, manage and secure their mission critical wireless networks. (Exh. 2, p.46.); and

... is a commercial Telematics Service Provider delivering mission critical wireless data services where our workforce needs them the most, on the road. Webtech has built a robust end-to-end Wireless Vehicle Services System and a suite of fleet management services all delivered through hand-held PDAs or Laptops and the WebTech... (Exh. 2, p.52.)

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<sup>4</sup> The excerpts identified as "Exh. 1" were attached to the Trademark Examining Attorney's first Office action. Those identified as "Exh. 2" were attached to the final Office action.

In each of these excerpts, the words "critical wireless" must be read in the context of the words around them. We find that the word "critical" modifies the word "mission," not the word "wireless," and that the word "wireless" in these excerpts modifies the words which follow it. The first excerpt quoted above refers to a company providing "wireless enterprise business solutions" which are "mission critical," i.e., "critical" to the missions of its customers. A synonym for "critical" in this context would be "essential." Likewise in the second excerpt, the company is providing "wireless system support" which is "critical" to the mission at hand. In the third excerpt, the company provides services which allow their customers to deploy, manage and secure their "wireless networks," which are critical to their mission. In the fourth excerpt, the company delivers "wireless data services" which are critical to the customer's mission.

Our interpretation of the words "mission critical wireless" is reinforced by many of the other Nexis excerpts of record, which hyphenate "mission-critical," showing that "critical" modifies "mission," not "wireless," and that "wireless" modifies the words following it. These excerpts include:



Intermec has 20 years' experience designing and installing mission-critical wireless networks for high-traffic outdoor and industrial environments... Public wireless network access is becoming a "Main Street" phenomenon. (Exh. 1, p.12.);

... our hardware-based implementation is the first to easily support the migration from pilots to mission-critical wireless networks. (Exh. 2, p.7.);

... provides the foundation for building secure, scaleable, and mission-critical wireless networks. (Exh. 2, p.8.);

... Wavelength Corporation is the industry's leading provider of software solutions for the management of wireless LAN networks and mobile devices and the development of mission-critical wireless applications. Over 5,000 customers in nearly every industry use Wavelink's wireless management and application development software to solve the unique challenges involved in deploying, managing and controlling wireless LAN networks. (Exh. 2, p.9.);

Nextel expects to continue its leadership role in delivering mission-critical wireless data applications to businesses and government customers. (Exh. 2, p.21.);

Cognio, the leading provider of intelligent hardware and software spectrum management solutions that enable mission-critical wireless applications... (Exh. 2, p.27.);

mobileFOUNDATIONS is a customer-driven, innovative company, specializing in the development of mission-critical wireless applications that enable distributed people to work together as cohesive teams. mobileFOUNDATIONS' wireless solutions play key roles in several federal government agencies. NASA uses mobileFOUNDATIONS' wireless alerting capabilities for the monitoring and response for a ... (Exh. 2, p.31.); and

ReefEdge is dedicated to delivering a complete and secure infrastructure to support mission-critical wireless LAN deployments... (Exh. 2, p.41.)

Finally, we note that two of the Nexis excerpts show even more clearly that in the phrase "mission critical wireless," "critical" modifies "mission" and not "wireless," because "critical" and "wireless" are separated by a comma:

Azimuth has also announced symbol Technologies, a recognized leader in mission critical, wireless networking solutions, as one of several initial customers. (Exh. 2, p.25.)

In a world where time is of the essence, and an increasing number of tasks are mission-critical, wireless email and other soon-to-come applications will pave the way for a truly global mobile business landscape. (Exh. 2, p.35.); and

The Trademark Examining Attorney also has made of record numerous Nexis excerpts to support the proposition that, like "mission critical wireless," the phrase "business critical wireless" is used in the industry and is evidence that "critical wireless" is merely descriptive of applicant's goods. These include:

Transcomm plc owns and operates the UK network for business critical wireless data solutions. The Transcomm Network is a proven, reliable and cost-efficient network for business to business wireless data applications... (Exh. 1, p.5.);

... an enterprise-strength combination of applications, services, tools, and support for companies deploying business critical wireless solutions. (Exh. 1, p.17.);

Airespace's award-winning platform leverages a variety of intelligent hardware and software components to create business critical wireless networks. These include: ... (Exh. 2, p.19); and

What's more, growth in the Enterprise continued this quarter as Wi-Fi standards continued to improve and as new technologies were introduced to the market that ease the pains of deployment, security, and day-to-day management of large scale, business critical wireless networks. (Exh. 2, p.24.)

As with the "mission critical wireless" excerpts discussed above, we find that these "business critical wireless" excerpts, when read in context, show that "critical" modifies "business," and that "wireless" modifies what comes after it, such as "solutions," "networks" and "data applications." Likewise, as was the case with the "mission-critical wireless" excerpts discussed above, there are excerpts in which "business" and "critical" are hyphenated, which further show that "critical" modifies "business," not "wireless." Some examples are:

By looking to the new government requirements and leveraging the same commercial products that meet the most stringent end-to-end requirements, corporate environments can adopt a solution today that has been tested and validated to secure even the most business-critical wireless networks. (Exh. 2, p.18.);

We depend on partners like Airespace to provide reliable, business-critical wireless infrastructure to support the needs of our customers. (Exh. 2, p.34);

Airespace's industry leadership for business-critical wireless LANs in North America will help us effectively address the many different wireless requirements we see emerging throughout Japan. (Exh. 2, p.42); and

... The event, entitled "Optimizing Wireless LANs - Putting Your Air Space to Work", exposes enterprises to leaders in the field of wireless networking, arming them with all of the tools necessary to build and manage business-critical wireless networks. (Exh. 2, p.44.)

And, as was the case above with respect to "mission critical wireless," there are excerpts which show use of a comma between the words "critical" and "wireless":

The reliability, predictability and cost effective performance of our network continues to provide the best solution for leading companies such as Kwik-Fit Mobile who require dependable, business critical, wireless data communication. (Exh. 1, p.10.); and

To address this downturn and exploit new sales opportunities, the group has recently made a number of new sales appointments to increase the focus on new sales in business critical, wireless data markets, most notably within the Transport and Emergency Services sectors. (Exh. 2, p.49.)

The Trademark Examining Attorney, in his brief, also has cited specifically three other of the Nexis excerpts, which do not include references to either "mission critical wireless" or "business critical wireless" and which have not been discussed above. We find that these three excerpts, as well as all of the other excerpts which are not specifically quoted in this opinion, do not support the

Trademark Examining Attorney's mere descriptiveness refusal. These excerpts, and our findings with respect thereto, are as follows.

The first excerpt is:

These sales speak volumes for our value proposition: the perfect combination of a highly beneficial product at an attractive price point to address critical wireless customer satisfaction issues. These sales are a direct result of network improvements demonstrated during multiple-site cluster testing. Among the many benefits that were observed during the month-long test period, the RF(2) reduced dropped calls for the ... (Exh. 2, p.11.)

In this excerpt, "critical" modifies the entire phrase "wireless customer satisfaction issues," not just "wireless." This is apparent from the last sentence of the excerpt, which refers to one of these "wireless customer satisfaction issues" as the reduction of "dropped calls."

The next excerpt cited by the Trademark Examining Attorney is:

... As enterprises are looking ahead, putting WLAN monitoring into the security budget could go a long way toward solving these critical wireless security issues. WiFi Watchdog works with any standard wireless LAN (WLAN) deployment to detect, monitor and secure the location of all 802.11 traffic. It identifies any type of 802.11 device - authorized or unauthorized - as well as rogue access points... (Exh. 2, p.12.)

In this excerpt, "critical" modifies the entire phrase "wireless security issues," not just "wireless."<sup>5</sup>

The third excerpt cited by the Trademark Examining Attorney is:

The LTC3421 can generate output voltages as high as 5.25V, enabling it to power voltage rails that are commonly found in handheld applications. Its switching frequency of 3MHz keeps switching noise out of critical wireless frequency bands and enables the utilization of tiny low cost capacitors and inductors at less than 1mm profile. (Exh. 2, p.16.)

In this excerpt, "critical" modifies the entire phrase "wireless frequency bands," not just "wireless."

In each of these three and in all of the other excerpts the Trademark Examining Attorney has made of record which do not deal with "mission critical" and "business critical" wireless solutions, networks, applications, etc., "critical" modifies an entire phrase which follows "wireless," not just the term "wireless." We find that these excerpts do not support the proposition that "critical wireless," standing alone, is merely descriptive of applicant's goods.

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<sup>5</sup> A similar excerpt dealing with "security" (but not cited by the Trademark Examining Attorney) is: "Engineered to address the industry's most critical wireless security needs, including user authentication and data encryption, the HP ProCurve 520wl supports... (Exh. 1, p.9.)

We conclude that the Trademark Examining Attorney has failed to carry his burden of proving that "critical wireless" or CRITICALWIRELESS is merely descriptive of any industry or of any goods, including applicant's goods.

Decision: The refusal to register is reversed.